The learned Deputy in reply stated that the President did not fully appreciate the circumstances.

For his second offence the respondent was liable to a fine of $1,000 or six months' imprisonment or both. I was reluctant to interfere, but it was apparent that the accused, by his repeated offence, is imperilling the safety of road users, and I came to the conclusion that the Public Prosecutor's application was justified and that the punishment imposed was manifestly inadequate. I accordingly enhanced the sentence by sentencing the accused to three months' imprisonment in addition to the fine of $500 or four months' imprisonment already imposed.

Order accordingly.

Solicitors : *Sen & Lim.*

THE RUBBER INDUSTRY (REPLANTING) BOARD v. HONGKONG AND SHANGHAI BANKING CORPORATION

[O. C. J. (Buhagiar J.) July 11, 1956]

[K. L. — Civil Suit No. 149 of 1956]

Bills of Exchange Ordinance, 1949 s. 82 — Cheque made payable "account payee only" — Cheque collected for wrong person — Whether drawer of the cheque has cause of action — Whether bank which collects the cheque has been negligent.

In this case the plaintiffs issued a cheque in favour of one Toh Whye Teck in the sum of $6,762.33 and the cheque was marked "Account payee only". In some way unknown to the plaintiffs the cheque came into the possession of some unauthorised person. Subsequently one Lee Man Choi opened an account with the defendant bank in the name of Chop Toh Waye Teck and the cheque in favour of Toh Whye Teck was paid into this account. The plaintiffs claimed damages.

Held: (1) in the circumstances of the case there had been no delivery of the cheque to the payee and therefore the plaintiffs remained the true owners and were entitled to maintain the action;

(2) the defendant bank had not discharged the onus of proving that they have acted without negligence and are not entitled to the protection of section 82 of the Bills of Exchange Ordinance, 1949, and were liable to the plaintiffs for damages for conversion of the cheque.

Cases referred to :—

(1) *Bute (Marquess) v. Barclays Bank Ltd.* (1953) 3 All E.R. 365, 368.

(2) *Midland Bank Ltd. v. Reckitt* (1933) A.C. 1, 14.

(3) *Commissioners of Taxation v. British, Scottish & Australian Bank Ltd.* (1920) A.C. 683.

(4) *Norman v. Reckitts* (1886-7) 3 T.L.R. 182.

(5) *Thairlwall v. Great Northern Rly. Co.* (1910) 2 K.B. 509.

(6) *Ladbroke & Co. v. Todd* (1913-4) 30 T.L.R. 433.

(7) *Matthews v. Brown & Co.* (1893-4) 10 T.L.R. 386.

(8) *Pennington v. Crossley* (1897) 13 T.L.R. 513.

(9) *Re Deveze, ex parte Cote* (1873) 9 Ch. App. 27.

(10) *Lloyds Bank v. Chartered Bank of India, Australia & China* (1929) 1 K.B. 40, 69.

(11) *Lloyds Bank Ltd. v. E. B. Savory & Co.* (1933) A.C. 221.

(12) *Commissioners of State Savings Bank v. Permewan, Wright & Co.* 19 C.L.R. 457.

(13) *Morison v. London County & Westminster Bank* (1914) 3 K.B. 356.

CIVIL SUIT.

R. H. V. Rintoul for the plaintiff.

M. Edgar for the defendant.

Buhagiar J. : — In this case there is an agreed statement of facts as follows :

The plaintiff is a statutory corporation constituted by the Rubber Industry (Replanting) Fund Ordinance, 1952 and has its offices at Mercantile Bank Chambers, Kuala Lumpur. The defendant is a corporation with limited liability incorporated in Hongkong and carrying on the business of bankers in towns throughout the Federation of Malaya and has a branch at No. 2, Ampang Street, Kuala Lumpur.

In July 1954 one by the name of Toh Whye Teck was entitled to payment of the sum of $6,762.33 from Fund "A" cess and in consequence a cheque was drawn by the plaintiff in favour of the said Toh Whye Teck in the sum of $6,762.33. The cheque was drawn on the plaintiff's fund "A" cess account with the Kuala Lumpur branch of the Chartered Bank of India, Australia and China and was signed by the late Mr. Yong Shook Lin, then a member of the Board and by the Secretaries and Treasurers Messrs. Peat Marwick Mitchell & Co. the latter signature having been made by Mr. Villiers a partner in the firm. The cheque had a rubber stamp crossing marked "Account payee only" in large capital letters.

The said cheque was dispatched by the Secretaries and Treasurers in the usual course of business but in some way unknown to either the plaintiff or the

defendant the cheque came into the possession of some unauthorized person.

A Mr. J. C. Jones a constituent of the Bank called at the Kuala Lumpur branch of the defendant Bank and spoke to Mr. Lee an employee of the Bank in charge of Current Accounts. He stated that he wished to introduce a prospective Chinese customer who wished to open an account with the Bank. Mr. Lee took Mr. Jones and the Chinese prospective customer to the Compradore of the Bank Mr. Lee Thian Onn.

The prospective customer stated that his name was Lee Man Choi and on that day, the 6th August 1954, he opened an account with $2,000 cash. The account was opened in the name of Toh Waye Teck, 69 Murray Street, Seremban. The next credit was a cheque he paid in on the 10th August 1954 the number of the cheque was 236398 and was drawn on the Chartered Bank Kuala Lumpur for an amount of $6,762.33. This was the cheque which had been sent by the plaintiff to Toh Whye Teck on the 1st August 1954.

The account with the defendant Bank was opened in the name of Toh Waye Teck and the said cheque above referred to was endorsed by means of a rubber stamp reading "Toh Waye Teck sole proprietor" and was signed "Lee M.C." The name of the payee on the face of the cheque was "Toh Whye Teck".

The following witnesses have given evidence for the defendants: — Lee Thian Onn (D.W.1) the compradore, Mr. Snaith (D.W.2) the accountant, of the defendant Bank, and Mr. Harold Gordon Lee, an employee in charge of the current accounts department in the defendant Bank, whose deposition is in Ex. D. This evidence establishes the following facts:

On the 6th August, 1954, Mr. Gordon Lee, asked Mr. Lee Thian Onn, the compradore, to deal with Lee Man Choi who had been brought to the Bank by Mr. Jones. Mr. Jones was a constituent of the Bank; he had had an account with the Bank for several years and according to Mr. Snaith he had not given any cause for anxiety in connection with his account. Mr. Lee Thian Onn took certain particulars from Lee Man Choi which were recorded in the card usually kept when accounts are opened — (Ex. D.1). This card contains the name and address of the person opening the account, (Toh Waye Teck) his specimen signature, his business and nationality and the date on which the account is opened. Under the part reserved "For Use of Bank Only" Mr. Lee Thian Onn inserted the following particulars: "No. of certificate 56434 — Sole proprietor as shown in the Registration — Lee Man Choi". These particulars were filled in from a document produced by Lee Man Choi which purported to be a Registration and Licensing of Businesses Certificate and which according to Mr. Lee Thian Onn was signed by the Registrar of Businesses. This document was handed back to Lee Man Choi. The account was opened in the name of "Chop Toh Waye Teck".

As Lee Man Choi had given an address in Seremban, Mr. Lee Thian Onn asked him why he wanted to open an account in Kuala Lumpur; Lee Man Choi explained that he was in the rubber business and was expecting to have more dealings in Kuala Lumpur.

It does not appear that Lee Man Choi was asked to produce his identity card and the evidence shows that no further inquiries were made when the cheque in question was collected by the defendant Bank.

Mr. Snaith stated that documents from the Registrar of Businesses Department are accepted by the Bank on their face value.

The claim of the plaintiffs for $6,762.33 either as damages suffered by them, the defendant Bank having converted the cheque to its use and wrongfully deprived the plaintiffs of the same, or alternatively as money received by the defendant for use of the plaintiffs.

The relevant provision of law to be considered in relation to these facts is section 82 of the Bills of Exchange Ordinance, 1949 (No. 75 of 1949) and the two issues are:—

(1) whether the plaintiffs have a cause of action, or in other words whether they are "true owners" of the cheque; and

(2) whether the defendant Bank has been negligent in the collection of the cheque.

With regard to the first point it was submitted on behalf of the defendant that as the plaintiffs had despatched the cheque to the person entitled to the proceeds there has been delivery and the true owner of the cheque was the payee; the plaintiffs were not entitled at that time to the immediate possession of the cheque and therefore, not being the true owners, they had no cause of action as against the defendant Bank. For these proposition counsel for the defendant Bank relied on *Bute (Marquess) v. Barclays Bank Ltd.*[1] and *Midland Bank Ltd. v. Reckitt*[2]. Counsel for the plaintiffs referred to the definition of "delivery" in section 2 of Bills of Exchange Ordinance, 1949 (No. 75 of 1949) and submitted that although the cheque was despatched there has not been delivery within the meaning of that definition because there was no transfer

of possession from the drawer to the payee, the cheque not having reached the payee.

Section 21 of the Bills of Exchange Ordinance, 1949, has also been referred to by counsel for the plaintiffs and by counsel for the defendant, the former relying on sub-section (1) thereof and the latter on sub-section (3).

There are several cases where an action has been successfully maintained by the payee who never was in actual possession of a cheque or other instrument because although such cheque or instrument was despatched it never reached the payee; e.g. *Commissioners of Taxation v. English, Scottish and Australian Bank Ltd.*[3]; *Norman v. Reckitts*[4]; *Thairlwall v. The Great Northern Railway Co.*[5].

On the other hand there are cases where in similar circumstances as to despatch an action was successfully maintained by the drawer of the cheque : e.g. *Ladbroke & Co. v. Todd*[6]; *Matthews v. Brown & Co.*[7].

The effect of these cases seems to me to be that delivery is made at the risk of the sender unless the intended recipient has in some way authorized such means of delivery; this is clearly so in the case of delivery by post — see *Pennington v. Crossley*[8], and when a bill has once been posted, delivery is irrevocable (*Re Deveze, Ex parte Cote*[9]), for a letter once sent cannot be reclaimed, but until actually entrusted to the post-office authorities the property remains in the sender, so that where a letter containing a bill is closed and placed in the letter-box of an office, but stolen therefrom before being posted, the theft is from the sender — see *Halsbury's* Laws of England, 3rd. ed. Vol. 3 p. 164 para 262.

In the present case, according to the agreed statement of facts "the cheque was dispatched by the Secretaries and Treasurers in the usual course of business but in some way unknown to the plaintiff and the defendant the cheque came into the possession of some unauthorized person" and the particulars given by the solicitors for the plaintiffs by letter dated the 13th October, 1955 (p. 20 of Ex. B — Agreed Bundle of Correspondence) it is stated: "The plaintiff is not aware of the circumstances under which the said cheque was taken except that the cheque was prepared for posting in the usual way but did not reach the addressee." On the part of the defendant Bank it was not pleaded that the dispatch of the cheque amounted to payment.

Under these circumstances there was not, in my opinion, delivery of the cheque and the plaintiffs remained the true owners; possession thereof remained in the plaintiffs and payment of the cheque could be stopped until presentation; and adopting the example used by Lord Atkin in *Midland Bank Ltd. v. Reckitt*[2] at p. 14, if it can be supposed that the plaintiffs found Lee Man Choi standing at the counter of the Bank waiting to pay in the cheque they could have demanded the immediate delivery of the cheque to them.

With regard to the second point the question to be determined is whether the defendant Bank is entitled to the protection of section 82 of the Bills of Exchange Ordinance, 1949 (which incorporates the provisions of section 82 of the Bills of Exchange Act, 1882, and of section 1 of the Bills of Exchange (Cross Cheques) Act, 1906). It is not contested that the defendant Bank acted in good faith and the only question is whether that Bank has discharged the onus of proving that they had acted without negligence.

It is well established that the question of negligence is one of fact and that each case must be determined on its own circumstances : see *Commissioners of Taxation v. English, Scottish & Australian Bank Ltd.*[3] this case also lays down (at p. 689) that "being a question of fact, it is really impossible to lay down rules or statements which will determine what is negligence and what is not".

With regard to what is negligence Sankey L.J. in *Lloyds Bank v. The Chartered Bank of India, Australia & China*[10] at 69 said :—

> "What is negligence, under the circumstances? The difficulty is that the statute does not speak of any corresponding duty, but leaves that to be inferred. I think the duty of the defendants to the true owner of the cheque was (1) to exercise the same care and forethought with regard to the cheque paid in by the customer as a reasonable man would bring to bear on similar business of his own and (2) to provide a reasonable and competent staff to carry out this duty."

In *Bute (Marquess) v. Barclays Bank Ltd.*[1] at p. 370 this was considered a somewhat lower test than that adopted by Lord Warrington of Clyffe in *Lloyds Bank, Ltd. v. E. B. Savory & Co.*[11] at p. 221 as being ascertained "by reference to the practice of reasonable men carrying on the business of bankers, and endeavouring to do so in such manner as may be calculated to protect themselves and others against fraud".

In view of the facts in this case it is also important to refer to Lord Dunedin's speech in the *Commissioners of Taxation v. English, Scottish & Australian Bank Ltd.*[3] where at p. 688 he said :—

> "The remaining point is, Was there negligence on the part of the bank in collecting the cheque? Their Lordships say 'in collecting the cheque,' because that is

in a slightly different phrase what the statute says, 'without negligence receives payment for a customer.' It is not a question of negligence in opening an account, though the circumstances connected with the opening of an account may shed light on the question of whether there was negligence in collecting a cheque. In the case of **Commissioners of State Savings Bank v. Permewan, Wright & Co.**[12] in the High Court of Australia, Isaacs J. says: 'Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in **Morison v. London County and Westminster Bank**[13], and relevant to the present, are (1) that the question should in strictness be determined separately with regard to each cheque; (2) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry.' If there be inserted after the words "given cheque" the words 'coupled with the circumstances antecedent and present,' their Lordships think this is an accurate statement of the law."

It was submitted on behalf of the defendant Bank that in this case the account was opened in the usual course of business; the Bank had no ground for refusing the introduction by Mr. Jones; furthermore enquiries were made by Mr. Lee, the compradore, when the account was opened. That being so, it was submitted, there was no negligence in the opening of the account and the defendant Bank was not put on enquiry when the cheque in question was collected and there was no negligence.

In the circumstances of this case it seems to me to be difficult to separate the two transactions of the opening of the account and of collecting the cheque; it is quite clear that the defendant Bank did not consider it necessary to make any enquiries in collecting the cheque because enquiries had been made when the account was opened. Now with regard to the opening of the account the evidence shows that the defendant Bank acted (1) on the introduction of Lee Man Choi by Mr. Jones, a constituent of the Bank and (2) on a document which purported to originate from the office of the Registration of Businesses in which Lee Man Choi was shown to be the sole proprietor of Toh Waye Teck; on these inquiries the account was opened in the name of "Chop Toh Waye Teck". It seems that very little was known by the Bank about Mr. Jones except that he was a customer of the Bank, he had been cashing cheques at the Bank and that his account gave no rise for concern; his occupation and his address were not known. With regard to the document from the Office of the Registration of Businesses this has not been proved to be genuine. No check was ever made at the register of business, which is open to inspection on application made to the Registrar and on payment of the prescribed fee (see Rule 12 of the Registration and Licensing of Business Rules, 1953 (L.N. No. 138 of 1953)). In my opinion therefore there was negligence on the part of the defendant Bank, whatever test is applied, and such negligence affected the later transaction in collecting the cheque. But even assuming there was no negligence in the opening of the account, which I hold there was, the defendant Bank was put again on enquiry when the cheque in question was presented for collection; the cheque was crossed "account payee only", the payee was "Toh Whye Teck" and the account at the Bank was in the name of "Chop Toh Waye Teck". I do not think much, if any, importance is to be attached to the different spelling of second words "Waye" and "Whye" in view of the different Chinese dialects prevailing in this country where the same Chinese character may be pronounced differently and therefore spelled differently in Roman characters and more so in this case where the same person, that is Lee Man Choi, opened the account and presented the cheque for collection at the Bank. It may be that Lee Man Choi was the sole proprietor of the firm Toh Waye Teck in whose name the account was opened but this firm might be different from the individual Toh Whye Teck, the payee of the cheque. Apart therefore from the negligence in the opening of the account, there was also negligence in the collection of the cheque.

In my opinion, therefore, the defendant Bank has not discharged the onus of proving that they have acted without negligence and are not entitled to the protection of section 82 of the Bills of Exchange Ordinance, 1949, and are liable to the true owners, the plaintiffs, for damages for conversion of the cheque.

There shall be judgment for the plaintiff in the sum of $6,762.33 and costs.

Judgment for the plaintiff.

Solicitors: *Shearn, Delamore & Co.; Bannon & Bailey.*